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Ownership of Interviews: A Theory for Protection of Quotations

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Ownership of Interviews: A Theory for Protection of Quotations*

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I. INTRODUCTION

A news reporter interviews a political science professor to obtain information on international conflicts. The professor answers all of the reporter's questions, asking only that he be quoted accurately and fairly. When the article appears in print, the professor discovers that he received no credit for his verbatim statements. Infuriated, the professor confronts the reporter, who blames the error on sloppy editing and poor proofreading. The frustrated professor seeks legal recourse against the newspaper.

Historically, courts provided few remedies to interviewees whose statements were wrongly used by interviewers.¹ Despite some sugges-

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1. *Falwell v. Penthouse Int'l*, 521 F. Supp. 1204 (W.D. Va. 1981).

tions that copyright protection was available for oral statements made in interviews,² courts consistently refused to recognize copyright in conversations. However, the potential for successful copyright of oral statements exists.³ Some commentators, and the Office of Copyright, indicate that interviews should be protected by a "dual" copyright.⁴ Under the dual theory, both the interviewer and the interviewee can claim copyright in their respective expressions, absent an agreement to the contrary.

Similar to the hypothetical involving the political science professor, interviewees whose oral statements were wrongly used can seek legal redress. This Comment examines the legal rights of interviewees who want to protect their oral statements. First, the Comment discusses fixation, which separates common law copyright claims from statutory copyright claims. Second, the Comment explores common law claims available for unfixed works. Third, the Comment examines protection of fixed interviews under the Copyright Act of 1976⁵ (the "Act"). Finally, the Comment further divides statutory protection, evaluating permissible use of quotations by interviewers and by third parties.

II. FIXATION

Fixation determines whether federal statutory⁶ or common law copyright applies. Common law and state statutes protect interviews that are not "fixed in a tangible medium of expression."⁷ In contrast, federal law protects "fixed" works. Examples of unfixed works include "an extemporaneous speech, 'original works of authorship' communicated solely through conversations or live broadcasts, and a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down."⁸ States can protect unfixed works through common law or state statutes.

A. Factors Determining Fixation

Because fixation determines whether federal or common law ap-

2. *Estate of Hemingway v. Random House*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1969).

3. See A. LATMAN, *THE COPYRIGHT LAW* 115 n.3 (6th ed. 1986). See 1 M. NIMMER, *NIMMER ON COPYRIGHT* § 2.02 (rev. ed. 1987).

4. COMPENDIUM II OF COPYRIGHT OFFICE PRACTICES § 317 (1984) [hereinafter COMPENDIUM II].

5. 17 U.S.C. § 101 (1982).

6. 17 U.S.C. § 102(a) (1982). Statutory protection requires a "work of authorship" that is "fixed in any tangible medium of expression, now known or later developed." For purposes of this Comment, we will assume that the article containing the interview meets the "work of authorship" requirement.

7. *Id.* § 301(a), (b)(1).

8. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 131 (1976) [hereinafter HOUSE REPORT].

plies, the factors constituting fixed works are critical. Fixed works must be contained "in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."⁹ Federal statutes and the United States Constitution¹⁰ require that fixation be in a tangible form.

The 1976 Act states that a work meets the fixation requirement when it is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."¹¹ The work need not be written—merely "sufficiently permanent" to permit reproduction. Thus, works embodied in a copy or phonorecord meet the fixation requirement if they are preserved by or under the authority of the author.¹²

The "sufficiently permanent" requirement creates problems for live radio and television broadcasts, which are not technically "fixed" under the Act. Congress, however, provided that simultaneously recorded live broadcasts should be protected the same as previously recorded broadcasts.¹³ Because broadcasters commonly record live programs, broadcasters meet the stability requirement for virtually all programs.¹⁴

The legislative history for the Act indicates that Congress wanted to avoid artificial distinctions based on the medium used to express the work.¹⁵ The Act places no emphasis on a work's form, manner, or medium of fixation. A work may be expressed in words, numbers, notes, sounds, pictures or by any other machine or device now known or later developed.¹⁶

The Act also requires that a fixed work be preserved "by or under the authority of the author."¹⁷ The authority question is crucial to works consisting of interviews. Typically, the interviewee consents to use of the interview. However, the oral statements of interviewees may be captured on concealed tape recorders or other devices, without the authority of the author. In theory, oral statements taped without the interviewee's knowledge or authority are unfixed. The courts,

9. 17 U.S.C. § 102(a) (1982).

10. U.S. CONST. art I, § 8, cl. 8; see 1 M. NIMMER, *supra* note 3, § 2.03 (B). If a work is not in tangible form, it does not qualify as a "writing" under the constitutional clause authorizing copyright.

11. 17 U.S.C. § 101 (1982).

12. *Id.*

13. *Id.*

14. 1 M. NIMMER, *supra* note 3, § 2.03 (B)(2).

15. See HOUSE REPORT, *supra* note 8, at 52; *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908) (piano roll was not a "copy" of musical composition recorded on the roll).

16. See HOUSE REPORT, *supra* note 8, at 52.

17. 17 U.S.C. § 101 (1982).

however, rarely address the authority distinction, so the importance of the issue is unclear.

Under the Act, Congress specifically excluded transient works, which cannot be reproduced, from the list of fixed works.¹⁸ Transient works include images projected briefly on a television screen without simultaneous recording, or material captured momentarily on a computer screen. However, an interviewer could fix a transient computer work simply by saving the material on a computer disk.

B. Application

To determine whether an interview has been "fixed," the interviewee first must consider the method used to preserve the conversation. Journalists generally use one of four methods to preserve oral statements.¹⁹ First, a reporter may record the interview on either audio or video tape. Second, the journalist may preserve the interview in shorthand. Third, the reporter may take random notes of the oral statements. Fourth, some journalists, who conduct interviews by telephone, may type quotations directly into a computer.

The first method of preserving interviews, audio or video tape, generally provides a fixed, verbatim account of the conversation. The interview meets the stability requirement because the tape can be reproduced "with the aid of a machine."²⁰ The taped interview also meets the authority requirement as long as the interview was conducted by or under the authority of the author.²¹ However, if the interviewee had no knowledge of and did not authorize the recording, the taped interview is not fixed.

The second mode of interviewing, shorthand, also produces a verbatim record of the interview. The shorthand interview meets the stability requirement because the work can be reproduced simply by reading the shorthand. The shorthand interview also meets the authority requirement if the shorthand account was authorized by the interviewee. An interviewee who is aware of the shorthand recording probably has authorized the fixation under an implied consent theory. Thus, if the interviewee agrees to or knows of the recording, the shorthand interview probably is fixed under statutory copyright.

The most common journalistic method of preserving interviews is the random notetaking method. Fixation in the random-note situation often depends on the thoroughness of the notes.²² Theoretically, only the portions of the interview preserved verbatim, by the author-

18. See HOUSE REPORT, *supra* note 8, at 53.

19. Comment, *Copyrighting Conversations: Applying the 1976 Copyright Act to Interviews*, 31 AM. U.L. REV. 1071 (1982).

20. 17 U.S.C. § 101 (1982).

21. *Id.*

22. See Comment, *supra* note 19, at 1076.

ity of the author, are fixed. If the interviewer records only key words without a verbatim transcript, the interview is not fixed.²³

Under the random-note method, the interviewer basically recreates the conversation in his own words. However, the interviewee can claim fixation of direct quotations if the interviewee authorized the recording of the verbatim quotes. In contrast, when material has been paraphrased and no transcript of the interview exists, the interviewer has not "fixed" the quotations within the meaning of the 1976 Act. Thus, in most cases, except possibly for direct quotations, the interviewee's contribution to a random-note interview is an unfixed work, and therefore protected only by common law.

Finally, some journalists who conduct telephone interviews preserve the interviewee's oral statements by typing quotations directly into a computer. As in the random note situation, courts first consider whether the interviewer recorded verbatim or paraphrased the statements. If the interviewer paraphrased, the interviewer has a statutory copyright claim in the fixed re-creation of the conversation. However, the work must be saved on a computer disk to overcome the transient duration problem.

In contrast, the interviewee would have a statutory copyright claim for fixed statements and a common law copyright claim for unfixed statements. Fixed quotations must be recorded verbatim on the computer screen under the authority of the interviewee. In addition, the verbatim statements must be filed on a computer disk or preserved in some method capable of reproduction. To claim copyright in paraphrased, unfixed statements the interviewee must rely on common law or state statutes.

In sum, fixation determines whether common law or federal statutory law protects an interviewee's right to quotations. Federal statutory copyright²⁴ protects only fixed works, while common law or state statutes protect unfixed works. Interviews recorded on audio or video tape generally qualify as fixed works. Shorthand interviews are fixed, when authorized by the interviewee. In contrast, interviews preserved through random notetaking probably are unfixed and would qualify only for common law protection. However, direct quotations within the random-note interview arguably are fixed if they are preserved by the authority of the author and can be reproduced.

III. COMMON LAW COPYRIGHT PROTECTION

Common law copyright protects unfixed works such as conversations or improvised live broadcasts.²⁵ Only one state, California, ex-

23. *Id.*

24. 17 U.S.C. § 301 (1982).

25. See HOUSE REPORT, *supra* note 8, at 131.

pressly protects unfixed works of authorship.²⁶ In contrast, New Jersey requires that works be fixed in writing or some other tangible form to be protected by common law copyright.²⁷ The New Jersey scheme, in effect, eliminates common law copyright because fixed works are protected only by statutory copyright. Under New Jersey law, no common law protection would be available for oral statements. Other states have left the issue of common law copyright protection for oral statements to the courts, but courts have failed to decide the issue.²⁸

In *Estate of Hemingway v. Random House*,²⁹ the estate of Ernest Hemingway sued the author and publisher of the book PAPA HEMINGWAY. The young author, A.E. Hotchner, was Hemingway's friend and drinking companion. In his book, Hotchner included numerous quotations from his discussions with Hemingway. The court addressed whether the conversations between the famed Hemingway and the relatively unknown Hotchner could be protected by common law copyright, although Hemingway himself had not reduced the words to writing.

The court suggested that, in some limited and special situations, if both parties understand oral statements to be the unique intellectual product of the principal speaker, the work could qualify for common law copyright protection provided the statements were in writing. However, the court required that the speaker "indicate that he intended to mark off the utterance in question from the ordinary stream of speech, that he meant to adopt it as a unique statement and that he wished to exercise control over its publication."³⁰ In *Hemingway*, the court stated that Hemingway's words and conduct made it clear that he was willing to let Hotchner use the conversations in writing and to publish excerpts from the conversations. Thus, the court dismissed the case because the defendant had Hemingway's consent.

Copyright commentators criticized *Hemingway* because the court advocated stricter requirements for copyright of oral statements than for written statements.³¹ For example, the court held that speakers must show a "unique intellectual product" and some "indication" that they planned to claim copyright in the words. Nimmer criticized the "unique intellectual product" standard because it requires some novelty or creativity for oral statements that is not necessary for copy-

26. CAL. CIV. CODE § 980 (a)(1) (West 1988).

27. *Rowe v. Golden W. Television Prods.*, 184 N.J. Super. 264, 445 A.2d 1165 (1982), cert. denied, 91 N.J. 241, 450 A.2d 562 (1982) (citing *Aronson v. Baker*, 43 N.J. Eq. 365, 12 A. 177 (Ch. 1887)).

28. *Falwell v. Penthouse Int'l*, 521 F. Supp. 1204 (W.D. Va. 1981); *Estate of Hemingway v. Random House*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1969).

29. 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1969).

30. *Id.* at 349, 244 N.E.2d at 258, 296 N.Y.S.2d at 779.

31. 1 M. NIMMER, *supra* note 3, § 2.02.

right protection of written statements.³² Similarly, the court's "indication" standard requires notice not needed for written copyright protection.³³ Courts also would have difficulty determining the methods permissible to indicate that the speaker intended to claim copyright. Thus, *Hemingway* provides little guidance for determining common law copyright in oral works.

Under the fixation analysis of the 1976 Act, some of the works in *Hemingway* would have been fixed and arguably eligible for statutory copyright protection. Hotchner tape recorded several of his conversations with Hemingway. In the taped interviews, the stability requirement was met because the tape recording can be reproduced. In addition, the authority requirement was met because Hemingway agreed to let Hotchner tape record the conversations. Thus, the taped conversations were fixed.

Hotchner also preserved some conversations through notes. The fixation of the conversations would depend on the extensiveness of the notetaking. If Hotchner merely paraphrased or preserved key words, Hemingway's quotations were not fixed. If, however, Hotchner recorded the quotations verbatim, the statements would have been fixed, provided the stability and authorization requirements were met. Thus, under the 1976 Act, some of Hemingway's statements could have been fixed through Hotchner's notetaking and eligible for statutory copyright protection.

Common law copyright of oral statements also was considered in *Falwell v. Penthouse International*.³⁴ The Reverend Jerry Falwell consented to an interview with two freelance journalists. The journalists sold the interview to Penthouse Magazine. Falwell sued, claiming the interview appeared in Penthouse without his consent and contrary to oral conditions given at the time of the interview.³⁵

The court rejected Falwell's claim that he should have a common law copyright in his oral statements. Noting that Falwell was a public figure, the court stated:

Plaintiff cannot seriously contend that each of his responses in the published interview setting forth his ideas and opinions is a product of his intellectual labors which should be recognized as a literary or even intellectual creation. There is nothing concrete which distinguishes his particular expression of his ideas from the ordinary.³⁶

The court relied on Falwell's consent to the interview to justify the

32. *Id.*

33. However, the indication requirement is somewhat analogous to the copyright notice for published works. Works published in visually perceptible copies may contain a notice that includes the year of first publication. 17 U.S.C. § 401 (a), (b) (1982).

34. 521 F. Supp. 1204 (W.D. Va. 1981).

35. *Id.* at 1208.

36. *Id.*

dismissal of the case.³⁷ However, the reliance on consent might be misplaced if Falwell actually had placed conditions on the use of the interview.

Nimmer again criticized the court's decision because it advocated a "literary" content test not required in statutory copyright.³⁸ If Falwell had written his statements, rather than spoken them, the statements would have been protected. Thus, the "literary" distinction seems irrelevant.³⁹

Finally, *Falwell* noted the potential to open the floodgates of litigation, allowing hundreds of claims from celebrities and public figures who are regularly interviewed by the media.⁴⁰ The flood gate argument is unconvincing. Litigation costs simply are too high for public figures to bring lawsuits for minor reporting errors. Further, most celebrities and public figures probably would not object to brief, fair use of their quotations.⁴¹

Despite the court's negative attitude toward protection of oral statements, *Falwell* suggests that, in rare circumstances, "a cause of action involving an oral expression can be sustained under a common law copyright theory."⁴² However, the court failed to elaborate on the narrow circumstances when oral statements could be protected. Thus, the court only invites conjecture of what circumstances will give rise to common law copyright protection.

Hemingway and *Falwell* failed to reach firm conclusions about common law copyright of oral statements. The courts looked at factors such as consent of the party interviewed, the uniqueness of the statements, indications that the speaker intended to claim copyright, and the potential for increased litigation. *Hemingway* and *Falwell* did not expressly recognize common law copyright of oral statements, nor did they preclude the possibility of such claims in the future. *Hemingway* and *Falwell* indicate that the possibility of a common law copyright in oral statements still exists. Realistically, however, at the present time interviewees probably could not retain control of their statements through common law copyright claims.

In most interview situations, the interviewee has consented to the use of the quotations. Courts place great emphasis on an interviewee's consent to use of the statements. However, an exception could be developed for statements made "off the record."⁴³

37. *Id.*

38. 1 M. NIMMER, *supra* note 3, § 2.02.

39. *Id.*

40. *Falwell v. Penthouse Int'l*, 521 F. Supp. 1204, 1207 (W.D. Va. 1981).

41. 1 M. NIMMER, *supra* note 3, § 2.02 n.37.1.

42. *Falwell v. Penthouse Int'l*, 521 F. Supp. 1204, 1208 (W.D. Va. 1981).

43. Off-the-record statements go beyond the scope of consent. Interviewers do not have permission to use off-the-record statements because the interviewee has not consented to the use.

Hemingway and *Falwell* also require proof of "literary" content in the oral statements. Statutory copyright does not require a showing of "literary" content. *Hemingway* also stated that a speaker must "indicate" his intent to claim copyright in oral statements. The indication requirement unfairly forces a speaker to give notice that is unnecessary in most statutory copyright claims, although some notice is required for statutory protection of published works.

As mentioned earlier in the discussion on fixation,⁴⁴ only unfixed works (such as random-note interviews) would qualify for common law copyright protection. The feasibility of a common law copyright in quotations based on random-note interviews is questionable. First, the interviewee must overcome the consent defense. The interviewee must show that the statements were recorded without his knowledge or that he placed special conditions on the use of the statements.

More importantly, the random-note interview generally fails to establish the *Hemingway* "indication" and "literary" requirements. If only random notes of the interview exist, the interviewee probably cannot prove that he indicated an intention to copyright his statements. Further, the interviewee must prove that his statements were "literary," and more than general, abstract ideas. The *Hemingway* standards are difficult to meet when no verbatim transcript of the interview exists.

Nimmer reveals a somewhat brighter picture for common law copyright of oral statements.⁴⁵ Nimmer states that as tape recording and other electronic devices become more popular, the need for common law copyright will increase. Nimmer's premise carries little weight when one considers fixation. In most cases, an interview preserved by video or audio tape will be considered fixed, unless the tape was made without the authority of the author. Thus, in the majority of cases, only non-verbatim portions of the random-note interview will qualify as unfixed.

In sum, interviewees probably have little chance to bring successful claims for common law copyright of oral statements. The key issue will be fixation. Although *Hemingway* and *Falwell* do not exclude the possibility of common law protection for interviews, both cases provide little, if any, guidance for bringing a successful lawsuit.

IV. STATUTORY COPYRIGHT PROTECTION

If a work is fixed, the 1976 Act expressly preempts all state statu-

44. See *supra* notes 6-8 and accompanying text.

45. 1 M. NIMMER, *supra* note 3, § 2.02. See Dunlap, *Copyright Protection for Oral Works—Expansion of the Copyright Law into the Area of Conversations*, 20 Bull. Copyright Soc'y 285 (1973).

tory and common law copyright claims.⁴⁶ When analyzing statutory copyright claims, courts first must determine whether the work is fixed. Second, courts must determine who owns the copyright in the work. Third, courts must consider permissible use of quotations, drawing distinctions between use by the interviewer and use by a third party.

A. Interview Ownership

When dealing with statutory copyright, courts have split on the issue of interview ownership. Some courts advocate interviewer ownership of the copyright.⁴⁷ Others maintain that the interviewer and the interviewee separately own their respective contributions, unless otherwise agreed.⁴⁸ Generally, the court's view of ownership determines the degree of copyright protection available.

1. *The Interviewer*

Several courts maintain that the interviewer is the sole owner of a work consisting of quotations. The courts reason that the interviewer recreates the conversation, organizes the article and forms the literary expression.⁴⁹

In *Harris v. Miller*,⁵⁰ the plaintiff alleged that the defendant's play infringed on a copyrighted biography of Oscar Wilde. The court found that the defendant's taking of quotations was substantial, and that use of quotation marks did not put the words in the public domain. Further, no stenographer recorded the conversations used in the biography. Therefore, the reconstruction of the conversations was the literary effort of the interviewer.

*Rosemont Enterprises v. Random House*⁵¹ also emphasized the interviewer's ownership in the work. In its suit, Rosemont Enterprises alleged that a Random House biography on Howard Hughes infringed on copyrighted articles about the eccentric billionaire. The district court rejected Random House's fair use defense because of the com-

46. 17 U.S.C. § 301 (1982).

47. *Quinto v. Legal Times*, 506 F. Supp. 554 (D.D.C. 1981); *Rosemont Enters. v. Random House*, 256 F. Supp. 55, 61 (S.D.N.Y.), *rev'd on other grounds*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Harris v. Miller*, 50 U.S.P.Q. (BNA) 306 (S.D.N.Y. 1941).

48. COMPENDIUM II, *supra* note 4, § 317.

49. *Quinto v. Legal Times*, 506 F. Supp. 554, 559 (D.D.C. 1981); *Rosemont Enters. v. Random House, Inc.*, 256 F. Supp. 55 (S.D.N.Y.), *rev'd on other grounds*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Harris v. Miller*, 50 U.S.P.Q. (BNA) 306 (S.D.N.Y. 1941).

50. 50 U.S.P.Q. (BNA) 306 (S.D.N.Y. 1941).

51. 256 F. Supp. 55 (S.D.N.Y.), *rev'd on other grounds*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

mercial gain involved.⁵² However, the court of appeals reversed, stating that Rosemont failed to show the infringement had lessened the value of the articles.

Similarly, in *Quinto v. Legal Times*,⁵³ the court upheld the interviewer's ownership in the copyright in the compilation of the interviewee's quotations. However, *Quinto* did not deny that interviewees could claim ownership of their statements. In *Quinto*, the defendant, The Legal Times, reprinted verbatim an article written by the plaintiff for the Harvard Law Record. The defendant argued the interviewer did not own copyright in the quotations. The court rejected the claim, stating that even if the plaintiff did not own copyright to the quotations, he had permission to use the material and a copyright in the compilation.⁵⁴

Thus, some courts maintain that the interviewer owns copyright in the interview. Factors leading to interviewer ownership include a re-creation of the conversation by the interviewer, the consent of the interviewee,⁵⁵ and the lack of an actual transcript of the interview. In applying the criteria to interviews, courts most likely would conclude that the interviewer owns the copyright in the work if no verbatim quotations were recorded. If the quotations were not recorded, the interviewer probably re-created the statements in his own expression. The interviewee then would have no statutory claim for copyright ownership in the quotations.

2. *The Dual Approach*

The Copyright Office takes the position that separate copyrights exist in works derived from an interview.⁵⁶ Commentators agree that interviews should be considered two separable works.⁵⁷ Under the dual copyright theory, the interviewer and the interviewee have ownership of their respective contributions, absent an agreement to the contrary.⁵⁸

Each has the right to claim copyright in his or her own expression in the absence of an agreement to the contrary. Where an application for such a work names only the interviewee or the interviewer as the author and claimant, and where the nature of authorship is described as 'entire text,' it is unclear whether the claim actually extends to the entire work, or only to the text by the interviewee or interviewer. In any case where the extent of the claim is not clear, the Copyright Office must communicate with the applicant for

52. *Id.* at 66.

53. 506 F. Supp. 554 (D.D.C. 1981).

54. *Id.* at 559.

55. The consent issue is important because courts could view consent as a transfer of any ownership rights the interviewee may have.

56. See COMPENDIUM II, *supra* note 4, § 317.

57. See A. LATMAN, *supra* note 3, at 115; 1 M. NIMMER, *supra* note 3, § 2.02.

58. See COMPENDIUM II, *supra* note 4, § 317.

clarification.⁵⁹

The dual approach to copyright of interviews is the better reasoned approach because both interests merit protection. Interviewers should have copyright in the compilation and organization of their articles, but interviewees deserve a copyright in their verbatim quotations. Problems arise under the dual approach if the parties cannot agree on their respective contributions. Despite some difficulties, the dual approach usually gives both parties credit for their respective works. Thus, the dual theory allows interviewees to protect their quotations from wrongful use by interviewers or by third parties.

B. Use by the Interviewer

Courts seldom address the issue of wrongful use of quotations by an interviewer. Most cases involve the wrongful use of quotations by third parties, who take material without authorization from the interviewer or interviewee.⁶⁰ However, as the dual theory of interview ownership becomes more prevalent, the number of cases involving wrongful use by an interviewer likely will increase.

Recently, in *Phillips v. INC Magazine*,⁶¹ the court discussed the improper use of quotations by an interviewer. In *Phillips*, the plaintiff was a domestic relations lawyer. A writer for INC Magazine interviewed the plaintiff by telephone for comments on divorce in the business world. The lawyer agreed to the interview, provided she was quoted accurately and given attribution for her quotations.

Upon publication of the story in INC Magazine, the plaintiff found that two paragraphs of her original verbatim statements were not attributed. The plaintiff registered the two paragraphs with the United States Copyright Office and filed suit for copyright infringement.

The court rejected the plaintiff's claim, stating that the plaintiff failed to "fix" a "work of authorship" in any "tangible medium of expression" under federal law.⁶² "More specifically, the plaintiff does not allege that the ideas transferred by her over the telephone to the defendant were embodied in a copy or phonorecord and therefore, were fixed at the time of transfer."⁶³ Thus, the case was dismissed for failure to state a claim.

However, the court did not completely preclude the possibility of bringing a successful statutory case. In footnote one,⁶⁴ the court noted

59. *Id.*

60. For a discussion on wrongful use by third parties, see *infra* notes 88-109 and accompanying text.

61. No. 86-5514 (E.D. Pa. Mar. 18, 1987)(Westlaw, DCT database).

62. 17 U.S.C. § 102(a) (1982).

63. *Phillips v. INC Magazine*, No. 86-5514 (E.D. Pa. Mar. 18, 1987)(Westlaw, DCT database).

64. *Id.* at n.1.

that if the ideas became fixed when printed in INC Magazine and then were used by the defendant, an infringement may have occurred. "Plaintiff, however, has not alleged any use of these statements other than the original printing in INC."⁶⁵

The language of footnote one implies that the court considered the article an "authorized" fixation. The court's reasoning probably would result in a "one-shot" rule for interviews. The interviewer would have the right to use the interviewee's statements for one article. If the statements are used in subsequent articles, then the interviewee could claim infringement.

The court's analysis, however, is flawed. The court failed to consider that the interviewee's statements could be fixed during the initial interview. An infringement claim depends upon the method used to preserve the interview. In *Phillips*, the interview was conducted by telephone. The reporter may have recorded the statements on tape (through a telephone recording device), in shorthand, in random notes or on a computer. As discussed earlier, fixation would depend on whether the statements were recorded verbatim, under the authority of the interviewee and in a method capable of reproduction. If the interviewee's statements became fixed during the initial interview, then infringement occurred if the interviewer used the fixation in preparing the subsequent article. If the interviewer's use of the fixation can be shown, then the interviewee has a claim for infringement.

The court also failed to address whether quotations consisting of a single or a few sentences are too "small" to be copyrightable. No rules specify the proper length of a work of authorship.⁶⁶ Thus, the brevity of a quotation is not necessarily a defense to copyright infringement. Interviewers, however, may be protected by other factors, such as the interviewee's consent to the use or the fair use doctrine.

When an interviewee consents to use of quotations, courts generally indicate that the interviewee cannot deny the interviewer use of the statements.⁶⁷ However, if the interviewer's use of the quotation goes beyond the interviewee's consent, the interviewer no longer is protected. In *Phillips*, the interviewee consented to use of her quotations as long as she was quoted accurately and she received credit for her statements.⁶⁸ When the interviewer failed to attribute the statements to the interviewee, the consent defense no longer applied. Similarly, consent would not protect interviewers who report quotations

65. *Id.*

66. See COMPENDIUM II, *supra* note 4, § 202.02 (i). However, the Copyright Office states that words and short phrases such as names, titles and slogans are not copyrightable. See 37 C.F.R. § 202.1 (a) (1987).

67. 1 M. NIMMER, *supra* note 3, § 2.02.

68. *Phillips v. INC Magazine*, No. 86-5514 (E.D. Pa. Mar. 18, 1987) (Westlaw, DCT database).

incorrectly, use off-the-record statements, or bypass the interviewee's consent in another manner. In sum, the interviewee's consent to use of quotations protects the interviewer from infringement claims, unless the use goes beyond the interviewee's consent.

Fair use also can serve as a defense to the interviewer's use of quotations.⁶⁹ Although no courts have considered fair use by an interviewer, Nimmer states that fair use could be a valid defense in such a situation.⁷⁰ The fair use doctrine⁷¹ was intended to permit "courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."⁷² The doctrine establishes four factors which courts must consider when analyzing fair use claims.⁷³ However, these factors are not exclusive. Courts may consider other factors as well. The doctrine also fails to specify how much weight should be given to each factor.⁷⁴ Thus, fair use is largely a mixture of law and fact, unique to each case.

1. *Purpose and Character*

In the preamble to the fair use doctrine, Congress stated that some uses, such as criticism, comment, news reporting, teaching, scholarship and research,⁷⁵ are most appropriate for finding fair use. However, courts continually have found that appropriate uses, such as news reporting, do not guarantee a finding of a fair use.⁷⁶ Other factors also must be considered, such as the commercial nature of the use,⁷⁷ the propriety of the defendant's conduct, and any errors in the use.⁷⁸

In interview cases, courts would be more inclined to find fair use if

69. 1 M. NIMMER, *supra* note 3, § 2.02.

70. *Id.*

71. 17 U.S.C. § 107 (1982).

72. Harper & Row, Publishers v. Nation Enters., 471 U.S. 539 (1985).

73. In determining whether the use made of a work is a fair use, the factors to be considered include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1982).

74. *Id.*

75. *Id.*

76. Harper & Row, Publishers v. Nation Enters., 471 U.S. 539 (1985).

77. 17 U.S.C. § 107 (1) (1982). See Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 448-49 (1984); Maxtone-Graham v. Burtchae, 803 F.2d 1253, 1261-62 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 2201 (1987).

78. See Maxtone-Graham v. Burtchae, 803 F.2d 1253, 1260-61 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 2201 (1987); Meeropal v. Nizer, 560 F.2d 1061, 1071 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

the quotation was used for news reporting, criticism, comment or research. Because most interviewees consent to use of their quotations,⁷⁹ fair use claims generally would involve interviewers who have exceeded the scope of interviewees' consent. To exceed consent, an interviewer generally must make substantial errors in the interviewee's quotations or ignore the interviewee's conditions. When the interviewer's purpose is comment or criticism, rather than commercial gain,⁸⁰ courts probably will not deny fair use unless the interviewer's conduct is blatant and purposeful.⁸¹

2. *Nature of the Copyrighted Work*

The second factor of the fair use defense, nature of the copyrighted work, analyzes factors such as whether the infringed work was published or unpublished. Courts generally agree that the scope of fair use is narrower with respect to unpublished works.⁸²

In an interview, the speaker's quotations are not published. Thus, the interviewer has less fair use protection than would be available for published works. Some courts indicate that less material may be copied from unpublished works than from published works under the fair use doctrine.⁸³ As a result, interviewees should have claims against interviewers who use a few quotations from an unpublished work without the interviewees' consent.

3. *Amount and Substantiality*

When evaluating the amount and substantiality of the portion used, courts continually look to the quality of the work used, not the quantity.⁸⁴ In addition, courts examine the form of expression used by the alleged infringer.⁸⁵

Applying the cited principles to interviews, courts again focus on the individual facts of each case. If, for example, the reporter used

79. See *supra* text accompanying note 43.

80. Some interviewers use inflammatory quotations to increase sales of newspapers and magazines.

81. *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1260-1261 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 2201 (1987). Noting the "comment" and "criticism" use of the work, the court refused to place great weight on errors made in the use of the statements. "Only where distortions were so deliberate, and so misrepresentative of the original work that no reasonable person could find them to be the product of mere carelessness would we incline toward rejecting a fair use claim."

82. *Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 213 (1987).

83. *Id.* at 97.

84. *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 2201 (1987).

85. *Salinger v. Random House*, 811 F.2d 90, 97 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 213 (1987).

only a few quotations, but the statements were of high quality, courts would weigh the factor heavily in favor of the interviewee. However, the success of the interviewee's claim depends on the court's balance of the quality, the quantity, and the expression of the statements taken.

4. *Effect on the Market*

The Supreme Court considered the market factor to be most important in fair use determinations.⁸⁶ To analyze market effects, courts look not only to present markets, but also to potential markets which interviewees might explore in the future.⁸⁷

In cases involving wrongful use of quotations by interviewers, courts generally weigh the market factor heavily in favor of interviewees.⁸⁸ The interviewers' misuse of quotations diminish markets for the interviewee because others will be less willing to buy rights to use the quotations. If the court finds that interviewees have been hurt financially by wrongful use of quotations, the court may reject the interviewers' fair use defense. In sum, interviewees have potential claims against interviewers for wrongful use of quotations. To succeed, interviewees first must overcome the issue of consent to the use of the quotations. After resolving the consent issue, interviewees still must surmount the fair use defense. Despite the consent and fair use hurdles, interviewees should have successful claims against interviewers who infringe on their copyrightable quotations.

C. Use by Third Party

In addition to the interviewer's wrongful use of quotations, many infringement cases involve wrongful use of quotations by third parties without permission from interviewees or interviewers. Unlike interviewers, third-party users generally cannot invoke the consent defense.⁸⁹ However, third-party users sometimes have a stronger fair use defense, especially when the quotation has been published.

In third-party cases, courts focus on several factors, such as commercial gain, errors, good faith, and comment or criticism by the third party. The leading United States Supreme Court case involving fair use by a third party is *Harper & Row, Publishers v. Nation Enterprises*.⁹⁰ In *Harper & Row*, the Supreme Court stated that news re-

86. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 566 (1985)(the market factor "is undoubtedly the single most important element of fair use").

87. *Salinger v. Random House*, 811 F.2d 90, 99 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 213 (1987).

88. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539 (1985).

89. *Id.*

90. *Id.*

porting does not override copyright protections, especially where commercial gain occurs.

Harper & Row involved a contract between former President Gerald Ford and Harper & Row publishers to feature excerpts of Ford's memoirs in Time Magazine. Before the excerpts were published, Nation Magazine received copies of the memoirs from an unauthorized source and printed several verbatim quotes. Time Magazine then refused to publish the excerpts and cancelled the contract.

Rejecting a fair use claim, the Court emphasized Nation's commercial purpose for printing the quotations. The commercial profit issue depends on "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."⁹¹ Further, the court noted the lack of comment and criticism in the article.

Harper & Row, however, is easily distinguishable from the typical interview situation. Many of the quotations taken from Ford's memoirs were not derived from interviews. Some statements, such as those from Alexander Haig, then-White House Chief of Staff, were made years earlier in the course of Haig's duties. Ford apparently re-created Haig's statements, based on his memory of the event. Thus, Ford had strong claims for copyright in both his statements and in the statements of others because Ford re-created and recorded his memory of the conversations with others.

Courts also consider whether errors were made in the use of a work and whether the third-party user acted in good faith. In *Maxtone-Graham v. Burtchaeil*,⁹² a Catholic priest used quotations from a 1973 pro-abortion book, which consisted of interviews with seventeen women. The priest, who was also a professor of theology at the University of Notre Dame, asked for permission to use the quotations but was refused. The priest and his publisher included the quotations in the book without permission,⁹³ and the plaintiff filed suit.

The plaintiff interviewer claimed ownership in all of the quotations because she had obtained copyright assignments from the interviewees. However, the plaintiff failed to record the assignments with the Copyright Office. The ownership issue was not addressed in the opinion because the court affirmed the grant of summary judgment based on the fair use defense.⁹⁴

Noting the "comment" and "criticism" nature of the work, the court refused to place great weight on errors made in the use of the

91. *Id.* at 568.

92. *Maxtone-Graham v. Burtchaeil*, 803 F.2d 1253 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 2201 (1987).

93. The priest considered paraphrasing the interviews, but felt that "it [was] essential for the credibility of my essay that the words of abortion veterans themselves appear." *Id.* at 1256.

94. *Id.* at 1255.

statements.⁹⁵ The court held: "Only where the distortions were so deliberate, and so misrepresentative of the original work that no reasonable person could find them to be the product of mere carelessness would we incline toward rejecting a fair use claim."⁹⁶

The court also refused to place great weight on the priest's questionable use of quotations after permission had been denied. Instead, the court noted that the priest obtained the quotations through legitimate channels and was willing to pay for use of the quotations.⁹⁷

Finally, in examining the commercial motive of the priest, the court noted that "[a]ll publications presumably are operated for profit."⁹⁸ The court reasoned that because of the small number of copies of the priest's book sold (about 6,000), the commercial use factor should not weigh heavily on the fair use defense.⁹⁹

Courts also consider the nature of the copyrighted work when deciding the propriety of a third-party's use of quotations. Factors the courts consider include whether the infringed work was published or unpublished. The publication distinction plays a major role in cases involving use by a third party. Courts generally agree that the fair use defense is stronger when dealing with published works.¹⁰⁰

In *Salinger v. Random House*,¹⁰¹ the defendant wrote a biography of novelist J.D. Salinger. Salinger refused to cooperate because he had chosen to avoid all publicity and had stopped publishing. The defendant's main source for the book were unpublished letters written by Salinger between 1939 and 1961. Most of the letters were donated to university libraries. Salinger sought an injunction barring publication of the biography, which contained the author's copyrighted, unpublished letters. Reversing the district court, the Second Circuit Court of Appeals granted the injunction.

Following the reasoning of the Supreme Court in *Harper & Row*, the court placed "special emphasis on the unpublished nature of Salinger's letters."¹⁰² The court noted two interpretations for the Supreme Court's statement that the scope of fair use is narrower with respect to unpublished works. The statement could indicate that copying is more likely to be unfair when unpublished works are involved. Alternatively, the statement could imply that the amount of material that may be copied under the fair use doctrine is less for unpublished

95. *Id.* at 1260-61.

96. *Id.* at 1260.

97. *Id.* at 1264.

98. *Id.* at 1262 (quoting *Rosemont Enters. v. Random House*, 366 F.2d 303, 307 (2d Cir. 1967)).

99. *Id.*

100. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539 (1985).

101. *Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 213 (1987).

102. *Id.* at 96.

works than for published works.¹⁰³ The *Salinger* court concluded that the scope of fair use is narrower when unpublished works are copied.

When evaluating the amount and substantiality of the portion used by a third party, courts again focus on the quality of the work used, rather than the quantity.¹⁰⁴ Factors considered include the number, size and importance of the quotations used, and the justifications for use of the passages.

In *Craft v. Kobler*,¹⁰⁵ the plaintiff sought an injunction to stop publication of a biography of composer Igor Stravinsky. The biography, "Firebird," contained extensive quotations from books written by the plaintiff.¹⁰⁶ The plaintiff, Craft, owned copyright in the quotations because Stravinsky had willed Craft his copyright to the quotations.

Rejecting the defendant's fair use defense, the court granted a preliminary injunction. The court concluded that "Firebird's appropriations of copyrighted material are too extensive and important, and their justification too slight to support an overall claim of fair use."¹⁰⁷

Finally, courts place great weight on diminished markets resulting from third-party infringement.¹⁰⁸ To analyze the effect on the market, courts look not only to present market factors, but also to potential markets the plaintiff might explore in the future.¹⁰⁹

In the interview situation, improper use of quotations by a third party could harm the interviewee in the future. Others might be unwilling to pay the interviewee for quotations that already have appeared without authorization in a third-party's work. As a result, future markets diminish and the interviewee suffers because of the third-party's infringement.

In sum, the interviewer's claim to prevent a third-party's use of quotations will depend on the circumstances of the case. Courts first will consider the commercial nature of the use, the propriety of the third party's conduct, errors in the use, and other relevant factors. Second, courts determine whether the quotations appeared in a published work. Third, courts examine the quality and quantity of the work taken. For example, in *Craft*, if Stravinsky had been alive and had not assigned his copyright to Craft, then Stravinsky also could have obtained an injunction to stop Kobler's use of the quotations. Finally, courts evaluate the effects of the third-party's use on commer-

103. *Id.* at 97.

104. *Maxtone-Graham v. Burtchaeil*, 803 F.2d 1253, 1263 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 2201 (1987).

105. *Craft v. Kobler*, 667 F. Supp. 120 (S.D.N.Y. 1987).

106. The plaintiff, Craft, published four "conversation" books written in the form of interviews of Stravinsky by Craft.

107. *Craft v. Kobler*, 667 F. Supp. 120, 130 (S.D.N.Y. 1987).

108. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 566 (1985).

109. *Salinger v. Random House*, 811 F.2d 90, 99 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 213 (1987).

cial markets. Interviewees' claims likely will succeed if the third party derives commercial gain from the use and diminishes markets for the interviewee.

V. CONCLUSION

Thorough analysis of copyright law indicates that interviewees have a legal recourse for wrongful use of their quotations. If a quotation is unfixed, common law protects the interviewee. If a quotation is fixed, statutory law protects the interviewee.

Despite apparent legal remedies, courts refuse to recognize copyright protection of oral statements. Public policy supports and demands that interviewees receive copyright protection for their quotations. Claims for protection of oral statements would promote more responsibility in the press. Reporters and editors would be accountable for misuse of quotations and errors in quotations. Further, protection of oral statements would enhance the free flow of information. Interviewees would speak more freely, knowing they could maintain some control over their statements.

Courts should acknowledge claims for copyright of oral statements. Interviewees deserve legal channels to protect their quotations. Some problems may arise when courts allow copyright of oral statements. For example, interviewees may have difficulty proving the content of their statements or proving that they did not consent to use of the quotations. However, technological advances in newsgathering should eliminate many of the problems. Each day hundreds of quotations are preserved on audio tape, video tape and computers. The benefits of copyright in quotations far outweigh the burdens.

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